IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1037 of 2004
in
MISC.CIVIL APPLICATION No 2239 of 2003
with
CIVIL APPLICATION No 2674 of 2004

Date of Decision: 14/10/2004

PWD EMPLOYEES' UNION

VERSUS

STATE OF GUJARAT

(for full cause title, see next sheet)

Coram:

The Hon'ble Mr.Justice Bhawan

The Hon'ble Mr.Justice H.K.Rathod, Judge

Whether approved for reporting?

For the Appellant Mr.Adv.Shalin N. Mehta

For the Respondent-1 & 2 Mr.Adv.General S.N.Shelat
with
Mr.AGP L.B.Dabhi

PER: H. K. RATHOD, JUDGE (CAV):-

Heard learned advocate Mr.Shalin Mehta for the appellant. Learned Advocate General Mr.S.N.Shelat is appearing for the Respondents State of Gujarat. In this appeal, order made by the learned Single Judge (Coram : Jayant Patel,J.) in Miscellaneous Civil Application No. 2239 of 2003 in Special Civil Application No. 7703 of

2002 dated February 25, 2004 is under challenge.

Whether reporters of Local Papers may be allowed to see the Judgment?Lo al Papers may be allowed to see the Judgment?Local Papers may be allowed to s e the Judgment?Local Papers may be allowed to see the Judgment?Local Papers ay be allowed to see the Judgment?Local Papers may be allowed to see the Judg ent?Local Papers may be allowed to see the Judgment?Local Papers may be allo ed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see he Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgmen ?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Pa ers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judgment?Local Papers may be allowed to see the Judg

2. The learned Single Judge has modified his earlier order dated 7th February, 2003 in Special Civil Application No. 7703 of 2002 to the extent that in place of the amount of Rs.2,11,86,306.00, the amount which is required to be disbursed at this stage would be Rs.1,36,29,094.00. Alongwith aforesaid modification, the learned Single Judge has also issued further directions and has disposed of the application filed by the State of Gujarat and the rule was made absolute to that extent indicated in the said order.

Said Misc. Civil Application No. 2239 of 2003 was filed by the State of Gujarat in December, 2003 with a prayer in terms of para 7(b) to modify the order dated 7.2.2003 to the extent of modifying the figure of Rs.2,11,86,306.00 to Rs.1,36,29,094.00 and consequently a direction given under para 3 of the order dated 7.2.2003. Except that, no other prayers were sought by the applicant State of Gujarat. Alongwith the Letters Patent Appeal, order in question dated February 25, 2004, oral judgment dated January 30, 1996 in Special Civil Application No. 3607 of 1982, Circular dated March 31, 1982, copy of the order dated November 7, 2003 in Misc. Civil Application No. 1615 of 2003, copy of the affidavit in reply against the review application filed by the appellant and other relevant orders have been annexed by the appellant. The respondent State of Gujarat has filed affidavit dated July 7, 2004 in this appeal which is made by Mr. A.G.Shaikh, Deputy Secretary, Narmada Water Resources Water Supply and Kalpasar Department, Sachivalaya, Gandhinagar on behalf of the State of Gujarat.

3. This appeal is having little long history and,

therefore, factual back ground is necessary. Same is narrated as under, in short:

In August, 1982, the appellant No.1 Union alongwith six daily wagers engaged in the maintenance works of the Ukai Dam Project filed special civil application no. 3607 of 1982 against the respondents herein in a representative capacity for and on behalf of 746 daily rated employees doing maintenance works at the Ukai Dam site. As per prayer (a), a mandamus was prayed for directing the respondents to give these 746 daily rated employees all the benefits viz. gratuity, pension, provident fund, casual leave, earned leave, sick leave and scales and grade etc. that were being given to the other permanent, temporary and work charged employees. As per para (b) of the prayer clause, a writ of mandamus was sought for directing the respondents to give to these 746 daily rated employees the benefits as per the Resolution dated 7.7.73 which is about Public Holidays and medical allowance to the daily rated workmen of nominal muster roll and as per the resolution dated 4.7.73 which is about work charge benefits and other incidental benefits at par with the Government servants.

On January 30, 1996, said Special Civil application was disposed of by this Court with directions in favour of the daily rated employees for payment of various benefits like arrears of annual earned leave, pension , gratuity, provident fund, public holidays and weekly off, leave travel concession, travelling allowance, group insurance, medical allowance, etc. Directions to pay the aforesaid benefits are contained in paragraphs 6, 7, 8 and 9 of the judgment and order dated January 30, 1996 in Special Civil Application No. 3607 of 1982.

Said judgment dated 30th January, 1996 was challenged by the present respondents before the Division Bench of this Court by filing Letters Patent Appeal No. 353 of 1997. On 22.4.1997, said Letters Patent Appeal No. 353 of 1997 was dismissed. While dismissing the said appeal, it was observed by the Division Bench of this court in para 8 of the judgment that in view of what is observed by the apex court, the learned Single Judge has rightly given the directions to the concerned respondents to grant benefit from 1st January, 1995 onwards as may be permissible under the relevant rules and resolutions. It was also observed that if it was a case that the benefit is required to be extended from retrospective effect i.e. from the date of their joining service, the matter would have been different. IN the

instant case, the persons have been working for more than 14 years, and, therefore, they were only requesting that they may be extended the same benefit which are being extended to others. If the State had taken care by examining the records as observed by the apex court and thereafter, placed before the court, the necessary materials to indicate as to how may persons are entitled to the benefit and how many are not entitled to the benefit, the matter would have been different. Learned counsel for the State could not point out whether the State has carried out this exercise or not. After making the aforesaid observations as per para 8 of the oral judgment, said letters patent appeal against the oral judgment dated 30th January,1996 was dismissed by the Division bench of this Court. Thereafter, the said oral judgment dated January 30, 1996 as confirmed by the Division Bench of this Court in Letters Patent Appeal No. 353 of 1997 by order dated April 22, 1997 was challenged by the State of Gujarat before the Hon'ble Supreme Court by filing Civil Appeal No. 2226 of 1998 which came to be dismissed by the apex court on 9.8.2000. Initially apex court granted interim stay of the directions issued against the State in final judgment and order dated January 30, 1996. Thus, the judgment dated January 30, 1996 confirmed by the Division Bench of this Court in LPA No. 353 of 1997 was confirmed by the apex court on 9.8.2000. Review petition No. 622 of 2001 filed by the State of Gujarat before the apex court for recalling and/or review the order dated 9.8.2000 in Civil Appeal No. 2226 of 1998 came to be rejected by the apex court on 25.7.2001. Thereafter, since the judgment dated January 30, 1996 was not implemented by the State of Gujarat, the present appellants filed Miscellaneous Civil Application No. 168 of 2001 before this Court under Article 215 of the Constitution of India and under section 10 of the Contempt of Courts Act, 1971 for initiating contempt proceedings against the officers of the State of Gujarat for not implementing the final judgment and order dated January 30, 1996 wherein affidavit in reply was filed by the Executive Engineer, Ukai Division No.1. On July 20, 2002, one letter was addressed by the appellant Union to the respondent No.2 to comply with the directions issued by this Court by judgment dated January 30, 1996. Similar request was made by the appellant union by letter dated July 25, 2002 to the Deputy Secretary of the respondents. Thereafter, the appellant union filed Special Civil Application No. 7703 of 2002 with a prayer to implement the directions issued by this Court dated January 30, 1996 in Special Civil Application No. 3607 of 1982. Thereafter, on 3.2.2003, as a measure of compliance, an order was passed

by the Finance Department of the State of Gujarat sanctioning an amount of Rs.2,11,86,306.00 for payment to the members of the appellant no.1 union and the said order was placed on record of special civil application no. 7703 of 2002. Thereafter, said special civil application no. 7703 of 2002 was disposed of by the learned Single Judge of this Court on 7.2.2003 with the following directions :

"(i) The concerned officer of the State Government shall disburse 60% of the sanctioned amount within a period of one month from today by distributing the amount as may be payable to the concerned workman by individual account payee cheque.

(ii) The balance amount of 40 % shall be disbursed by the concerned officer of the State Government within a period of three months thereafter and the said balance amount shall also be paid by account payee cheque only to the each concerned workman.

(iii) After the payment is realized if there is any short fall in calculation or otherwise, it will be open to the petitioners to make representation to the concerned authority for ventilating the grievance in respect thereof in accordance with law."

4. The State of Gujarat has worked out the details of arrears for payment to 524 daily wagers in view of the judgment of this Court in Special Civil Application No. 3607 of 1982 as under:

Sr. No.	Details	Amount Rs.
1.	Amount of leave surrender	4,63,891.00
2	LTC	4,93,021.00
3	TA Bills	1,51,950.00
4	Notional period,96-97	79,78,460.00
5	Project Allowance 6/98 to 7/2002	15,03,484.00

6 Transport Allowance
4/99 to 7/2000 18,58,929.00

7 Encashment of leave at
the time of retirement
and death 11,79,379.00

8 Public Holiday 75,57,212.00

2,11,86,306.00

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5. Thereafter, since the directions as per para (ii) issued by this court on 7th February, 2003 in Special Civil Application No. 7703 of 2002 were not complied with by the State of Gujarat, the appellant union filed Miscellaneous Civil Application No. 1321 of 2003 for revival of the Special Civil Application No. 7703 of 2002 on 15th July, 2003 which was withdrawn on 18th July, 2003 by the appellant union with a view to file appropriate application under the Contempt of the Courts Act, 1971. In July 2003, for non compliance of the directions, in view of the nonpayment of the balance 40 per cent of the amount, legal notice was served upon the respondents. On 2nd August, 2003, Misc. Civil Application No. 1615 of 2003 was filed by the appellant union under the provisions of the Contempt of the courts Act, 1971. On 19th August, 2003, Division Bench of this Court issued notice to the respondents, thereafter, on 16th September, 2003, order was passed by the Division Bench of this Court wherein it was clearly recorded that it was too late for the respondents herein to put up the defence that the sanctioned amount of Rs.2,11,86,306.00, calculation was wrong. This was recorded by the Division Bench of this Court in the Contempt Proceedings in view of the contention orally raised by the counsel for the respondents that there was a mistake in the calculation of the sanctioned amount as a result of which the remaining 40 per cent of the sanctioned amount was not payable. Thereafter, on 7.11.2000, during the course of hearing of the Misc. Civil Application No. 1615 of 2003, time was sought by the Counsel for the Government for the purpose of verifying whether the members of the appellant union had already been released the benefit of public holidays in past or not and with a view to avoid double payment,the respondents herein were asked to verify as to whether the benefit of public holidays had already been released or not to the members of the appellant union in past.The respondents were directed by the Division Bench of this Court on 7.11.2003 to release

the remaining amount in favour of the appellants on verification by their counsel meaning thereby, it was directed to release Rs.13,09,761.00 and the remaining amount of Rs.75,57,212/- invested in the name of the Registrar of this Court for a period of two months so that the interest accruing becomes payable to the parties held entitled for it.

6. Thereafter, on 2nd December, 2003, Misc. Civil Application NO. 2239 of 2003 was filed for modification/variation of the order dated 7th February,2003 passed in Special Civil Application No. 7703 of 2002 which review application came to be decided by the learned Single Judge of this Court on 25th February,2004 and by the said order dated 7th February, 2003 was modified to the extent indicated hereinabove i.e. in place of Rs.2,11,86,306.00, amount which is required to be disbursed at the said stage would be Rs.1,36,29,094.00. Learned Single Judge has,while modifying the said order, issued further directions under the same order dated 25th February, 2004 in Misc. Civil Application No. 2239 of 2003 which is under challenge in this letters patent appeal.

7. Learned advocate Mr.Shalin Mehta appearing for the appellant union has raised contention that the judgment given by the learned Single Judge of this Court in Special Civil Application No. 3607 of 1982 dated January 30, 1996 has attained finality between the parties as it was confirmed by the Division Bench of this Court in Letters Patent Appeal and then by the apex court in the civil appeal and the subsequent review petition filed by the State of Gujarat was also rejected by the apex court and, therefore, the learned Single Judge was not justified in examining the judgment dated 30th January, 1996 while entertaining Misc. Civil Application No. 2239 of 2003. He submits that in reality, order dated 25th February, 2004 in Miscellaneous Civil Application NO. 2239 of 2003 which is under challenge is review order or modifying the order dated 30th January, 1996 in Special Civil Application No. 3607 of 1982 and, therefore, learned Single Judge was not justified in passing the order in question. He also submits that new material was placed on record by the respondents in the review application being MCA No. 2239 of 2003 which ought to have been ignored by the learned Single Judge while considering the application for modification of the order passed in Special Civil Application No. 7703 of 2002. He submits that review application was filed by the respondent State on the basis of Government Resolution dated 31st March, 1982 which was not produced

by the respondents either before the learned Single Judge in Special Civil Application No. 3607 of 1982, Letters Patent Appeal No. 353 of 1997 and then before the apex court in the civil appeal against the judgment dated 30th January, 1996 as confirmed by the Division Bench of this Court. In Review Petition before the apex court also, said GR dated 31.3.82 was not produced by the State of Gujarat and in view of that, learned Single Judge of this Court ought not to have taken into consideration the said GR dated 31.3.82 while examining the MCA No. 2239 of 2003. He also submitted that the GR dated 31st March, 1982 is not applicable to the present appellants but it applies to the permanent Government employees who were regularly selected under the recruitment rules whereas the appellants were the daily wagers entitled for the benefits flowing from the GR dated 4.7.1973 and 7.7.1973 which were granted by the Court in favour of the appellants as per the judgment dated 30th January, 1996. He also submits that after the rejection of the civil appeal and the review petition in 2000-2001, present review application was filed by the respondents on 2nd December, 2003 after a period of more than two years on the basis of the new material which was never relied and produced by the respondents in earlier proceedings upto the apex court. He also raised the contention that the MCA No. 2239 of 2003 was filed by the State of Gujarat against the order dated 7.2.2003 in SPECIAL CIVIL APPLICATION No. 7703 of 2003 and except that, no other prayer was made by the State of Gujarat and, therefore, the learned Single Judge was not having the jurisdiction or power to review and/or modify the order passed in Special Civil Application No. 3607 of 1982 dated 30th January, 1996. He made a reference to certain observations made by the learned Single Judge before us to high light the submission about consideration of the merits of the earlier judgment in special civil application no. 3607 of 1982 while entertaining and examining the MCA No. 2239 of 2003. He submits that the review application was filed by the respondents beyond the period of limitation. He raised the contention that under the guise of review by producing new material, the judgment dated 30th January, 1996 has been re-examined by the learned Single Judge as if he has been acting as an appellate authority over the judgment in SPECIAL CIVIL APPLICATION No. 3607 of 1982. He submits that the learned Single Judge was not justified in adopting such a course while considering the MCA No. 2239 of 2003 for review of the order in SPECIAL CIVIL APPLICATION No. 7703 of 2002. He also submits that because of the operation of interim order passed by the apex court, benefits which were payable to the appellants w.e.f. 1st

January, 1995 to 2000 have not been made available to the appellants by the respondents. Said benefits were paid to the appellants for a period upto 31st December, 1994. He also submits that the respondents are not challenging the entitlement of the appellants in respect of the benefits which have been worked out by the respondents including the encashment of public holidays but the respondents are now, impliedly challenging the entitlement of the appellants for encashment of public holidays by placing reliance on G.R. dated 31st March, 1982 which was admittedly not produced by them in the earlier proceedings. As regards the contention of the respondents that they are prepared to give extra leave with wages for the work done by the appellants on public holidays, it was submitted that the work was undertaken by the respondents from the appellants on each and every public holidays between 1995 to 2000 and for that, there is no dispute or challenge. In short, it is his submission that the appellants are entitled for the benefit of public holidays in cash as per the judgment dated 30th January, 1996 which has attained finality upto the apex court and, therefore, the learned Single Judge was not justified in examining that aspect while considering the MCA No. 2239 of 2003. He also submits that the appellants are entitled for such benefits as per the right of restitution and, therefore, the respondents are bound to restore the original position by making payment in cash for the public holidays during which period the appellants had actually worked. Therefore, he submitted that the learned Single Judge has committed grave error in examining the merits of the judgment and order dated 30th January, 1996 by considering the GR dated 31st March, 1982 which was never produced by the State in the earlier proceedings. Learned advocate Mr. Mehta has placed reliance on the following decisions :

[1] M.K.Shah Engineers & Contractors v. State of M.P. [1999] 2 SCC 594;

[2] State of Orrissa and others v. Mangalam Timber Products, [2004] 1 SCC 139;

[3] South Eastern Coalfields Ltd. Vs. State of M.P. and others, [2003] 8 SCC 648;

[4] Karnataka Rare Earth and another vs. Senior Geologist, Department of Mines & Geology and another, [2004] 2 SCC 783.

8. On the other hand, Mr. S.N. Shelat, learned Advocate General appearing for the State of Gujarat has

clearly submitted that it was a mistake committed by the respondents in granting cash benefits of public holidays. He submitted that mistake can be corrected at a later stage also if it will be unjust for the Government and other similarly situated employees. He also submitted that cash benefit of public holidays was not given to any other employees in the State of Gujarat. He also emphasized that learned Single Judge has not committed any error in examining the merits of the judgment dated 30th January, 1996. He also clarified that the entitlement of the appellants for public holidays with wages is not in dispute. According to his submission, the learned Single Judge has simply rectified the mistake committed by the respondents and in doing so, no error has been committed by him.

According to the learned A.G. Mr. Shelat, it was the case of the respondents before the learned Single Judge in Review Application No. 2239 of 2003 that it was their mistake in calculating the amounts payable to the appellants in view of the order of this Court dated 30.1.1996 and on that basis, said MCA was filed for review and modification of the order passed in SPECIAL CIVIL APPLICATION No. 7703 of 2002 and the prayer was made to correct the figure of the amount by placing reliance on the GR dated 31.3.82. Learned Advocate General has emphasized this point that this was their mistake in calculation since the GR dated 31.3.82 was subsequently brought to the notice of the officers concerned. According to him, as per the GR dated 31.3.82, the appellants are not entitled for the encashment of public holidays because the said GR is not permitting for such encashment. It is his submission that in entire State of Gujarat, no employee is entitled for such benefit of encashment of public holidays if he was required to work on public holidays. In such circumstances, such employee is entitled only for compensatory leave in lieu of the work done by him on public holidays. Thus, it is his submission that the mistake committed by the respondents in calculation of the amount has rightly been rectified by the learned Single Judge by considering the GR dated 31.3.82. He relied upon the decision of Apex Court in case of S. Nagraj and others versus State of Karnataka, JT 1993 (4) SC page 27 and submitted that the Court is not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for the sake of justice. He relied upon para 18 and 19 of the said judgment which are reproduced as under:

"18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice, then, it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which are of us (RM Sahai, J.) was a member did not commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

19. Review literally and even judicially means re-examination or reconsideration Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the Courts culled out

such power to avoid abuse of process or miscarriage of justice. In Raja Prithvi Chand Lal Choudhury v. Sukhraj Rai and others, AIR 1941 Federal Court 1, the Court observed that even though no rules had been framed permitting the highest court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh 1 Moo PC 117 that an order made by the Court was final and could not be altered.

"nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possesses, by Common Law, the same power which the Courts of record and statute have of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies.

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. "

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed and substantive power to rectify on recall the order passed by this Court was specifically by Article 137 of the Constitution . Our

Constitution Makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogues to Order XLVII Rule 1 of the Civil Procedure Coude. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misrepresentation of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules, this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The Court is, thus, not precluded from recalling its own order if it is satisfied that it is necessary to do so for the sake of justice."

9. After placing reliance on the said judgment, it is his submission that it was a mistake on the part of the State Government in calculating the amount of cash benefit of public holidays which was not enjoyed by the appellants. As per GR dated 31.3.82, these appellants are not entitled for the cash benefit of such holidays and this mistake was rightly rectified by the learned Single Judge.

He also placed reliance on the decision in Lily Thomas, etc. etc. v. Union of India and Ors. [JT 2000 (5) SC 617] and submitted that the power of review can be exercised for correction of the mistake. He drew attention of this Court towards relevant portion of the judgment. He also clarified that the review application is filed by the State of Gujarat in SPECIAL CIVIL APPLICATION No. 7703 of 2002 and not in SPECIAL CIVIL APPLICATION NO. 3607/82. He also submits that learned Single Judge has no jurisdiction to review and/or modify the judgment of this Court in SPECIAL CIVIL APPLICATION No. 3607/82 dated 30.1.96 which has attained finality after the decision of the apex court. He also accepted that the GR dated 31.3.1982 was never produced/cited by the State of Gujarat before the Court in the earlier proceedings upto the Apex Court but it was produced for

the first time in MCA NO. 2239 of 2003. He also clarified that the circular dated 31.3.82 was not in the knowledge of the officer concerned.

10. Both the learned advocates have read the relevant portion of the order dated 25th February, 2004, 30th January, 1996 and other relevant orders before us. Except the submissions recorded hereinabove, no other submissions have been made by the learned advocates for the parties.

11. Now the question is whether it was a real and genuine mistake or error on the Part of the State Government or not. Since many years, the appellants were working as a daily wagers. Petition being SPECIAL CIVIL APPLICATION No. 3607 of 1982 was filed by them for the relief of regularization and all other consequential benefits at par with the permanent employees of the State of Gujarat. In the petition, two Resolutions were produced by the appellants dated 4.7.73 and 7.7.73 which are relating to various service benefits, status of work charged employees and weekly off as well as public holidays. Resolution dated 7.7.73 is very much clear that if any daily wager has completed 360 days service, he is entitled for the public holiday with wages. Over and above that, as per the said resolution, he is also entitled for weekly off on Sunday or any other day within a week as well as for medical benefits. In SPECIAL CIVIL APPLICATION No. 3607/82, this Court considering the said two resolutions dated 4.7.73 and 7.7.73, granted benefits by judgment dated 30.1.1996. These resolutions were considered and referred to in para 3 by the learned Single Judge in the judgment dated 30.1.96. Out of total 746 workmen, services of about 108 workmen were regularized as a work charged employees prior to 17.10.1988 and the remaining came to be regularized by a subsequent Resolution dated 17.10.88. The learned Single Judge granted benefits to the remaining employees except 108 workmen w.e.f. 1st January, 1995 in SPECIAL CIVIL APPLICATION No. 3607/82 by judgment dated 30.1.1996. Therefore, para 9 of the said judgment dated 30.1.1996 is relevant and is produced as under:

"9. The petition is filed on the footing that in view of rendering long service to the respondents, the petitioners are entitled to treatment on par with other regular government employees and on that basis, the aforesaid prayers as also claim for other benefits, if any, are made. Para 3 of the additional affidavit of

> Shri BB Chaudhary dated 12th December, 1995 clarifies the other claims by making reference to the benefits of (i) LTC, (ii) Leave Encashment, (iii) Public Holidays, (iv) Travel allowance (v) Group Insurance, (vi) Medical Allowance and (vii) Provident Fund. The claim for leave encashment, public holidays and provident fund as permissible under the relevant rules and resolutions has already been dealt with. Mr. Master states that the remaining benefits namely LTC, Travel Allowance, group insurance and medical allowance are being made available to the earlier mentioned group of 108 employees. He states that the remaining employees will be satisfied if these benefits are made available to them from 1st January 1995 onwards. This submission is reasonable enough and since there is no reason to discriminate between the two group of employees, the respondents will take necessary steps to give these benefits to the second group of employees from 1st January, 1995 as may be permissible under the relevant rules and resolutions."

12. In light of the above observations made by the learned Single Judge while deciding SPECIAL CIVIL APPLICATION NO. 3607 of 1982, appellants except 108 are entitled for all the benefits including the benefits under the Resolution dated 4.7.1973 and 7.7.1973 w.e.f. 1st January, 1995. This judgment was challenged by the State of Gujarat by filing Letters Patent Appeal. Interim stay was obtained and enjoyed by the State of Gujarat against the implementation of the judgment dated 30.1.1996 which stay remained in operation upto the matter decided by the apex court in the year 2000. The apex court dismissed the Special Leave Petition (Civil Appeal) and Review Petition filed by the State of Gujarat in the year 2000-2001. Thereafter, the question of payment of service benefits arose. The appellants daily wagers were not able to enjoy public holidays and all of them worked on all public holidays from 1995 to 2000 which is not disputed by the State of Gujarat. The appellants daily wagers had not enjoyed any public holidays and they worked on public holidays in view of the operation of the interim stay during this period. It is not the case of the State of Gujarat that the appellants were enjoying the public holidays and no work was taken from them by the State of Gujarat during the public holidays. In light of these undisputed facts, now, the question is that appellants daily wagers are entitled for encashment of public holidays on which they worked for entire five years period.

13. The Government Resolution dated 31.3.82 as it is not workable in present case. The suggestion made by the State of Gujarat in its affidavit is amounting to directing the employees to proceed on leave on working day and to give special leave with wages. State of Gujarat has not challenged the entitlement of the appellants daily wagers for public holidays with wages but the question is whether such benefits may be paid in cash or may be given by way of special leave with wages. The controversy is now so limited in light of the affidavit dated 7th July, 2004 filed by the State of Gujarat.

14. Now, we are examining whether the learned Single Judge was right in examining the merits of the judgment dated 30.1.1996 in SPECIAL CIVIL APPLICATION No. 3607 of 1982 which was confirmed by the apex court. We are also examining whether the learned Single Judge has transgressed his powers, authority and jurisdiction or not. MCA No. 2239 of 2003 was filed by the respondent State on the ground that if para 9 of the judgment dated 30th January, 1996 in SPECIAL CIVIL APPLICATION NO. 3607 of 1982 is perused alongwith the resolution dated 31.3.82, then, it is clear that against the benefit of public holidays, encashment is not available but in exchange, a Government servant can avail the leave on any working day and, therefore, prayer is made to modify the figure and direction given under para 3 in order dated 7th February, 2003 be modified to that extent. Except that, no other prayers have been made by the respondents.

15. Review application was filed against the order dated 7.2.2003 in SPECIAL CIVIL APPLICATION No. 7703 of 2002. Before that, the learned Single Judge passed order dated January 29, 2003. Both the orders are relevant. Therefore, order dated January 29, 2003 and February 7, 2003 in Special Civil Application No. 7703/02 are reproduced as under:

Order dated 29.1.2003:

"1. Secretary, Finance Department, State of Gujarat, Sachivalaya, Gandhinagar is permitted to be impleaded as party respondent No. 3.

2. Having heard Mr. Mehta, learned Counsel for the petitioner and Ms. Manisha Shah, learned AGP, it appears that there is no dispute on the point that the judgment of the learned Single Judge of this Court is confirmed by the Division

Bench of this Court and thereafter by the Apex Court of the Country. A Statement is made by Mr. B.H.Chaudhary, Executive Engineer, Ukai Dam in the affidavit in reply at para 5 that the arrears aggregating to Rs.2,11,86,306.00 is worked out by the Department and the proposal is forwarded by the Superintendent Engineer, Ukai Circle to the Government. The learned AGP after verification has stated before the Court that the proposal has been forwarded further and is pending for approval of the Secretary, Finance Department of the State Government.

3. In view of the above, it prima facie appears that in spite of the final decision of the Apex Court on 25.7.2001, till today the judgment is not fully complied with and no reasons are explained in the affidavit as to why the delay is caused in getting approval of the Finance Department of the State Government. Under these circumstances, I direct the Secretary, Finance Department, respondent NO.3 herein to personally remain present before this Court on 6.2.2003. However, if before 6.2.2003 the approval is already granted by the Finance Department, relevant material may be produced by the Secretary through the learned AGP before this Court and in that case, he need not remain present before this Court. The learned AGP shall additionally communicate this order to the Secretary, Finance Department, respondent No.3. SO to 6.2.2003. Direct Service is permitted."

Order dated 7.2.2003:

"1. Heard Mr. Shalin N. Mehta for the petitioners and Ms. Manisha Shah, learned AGP for the respondents.

2. Pursuant to the order passed by this Court on 29.1.2003, learned Assistant Government Pleader has produced the order dated 3rd February, 2003 passed by the Finance Department of the State Government whereby an amount of Rs.2,11,86,300/- (Rupees two crores eleven lacs eighty six thousand and three hundred only) is sanctioned by the State Government in compliance of the judgment of this Court passed in Special Civil Application No. 3607/1982. The said order is taken on record. The learned Assistant Government Pleader, on instructions from Shri

H.D. Sailor, Under Secretary to Government, Finance Department, has stated that 60% of the payment from the sanctioned amount shall be disbursed within a period of one month from today and she further stated that further three months' time may be granted for disbursement of 40% balance amount.

3. Having considered the above, this petition is disposed of with the following directions:

(i) The concerned officer of the State Government shall disburse 60% of the sanctioned amount, within a period of one month from today by distributing the amount as may be payable to the concerned workman by individual account payee cheque.

(ii) The balance amount of 40% shall be disbursed by the concerned officer of the State Government within a period of three months thereafter and the said balance amount shall also be paid by account payee cheque only to each concerned workman.

(iii) After the payment is released, if there is any short fall in calculation or otherwise, it will be open to the petitioners to make representation to the concerned authority for ventilating the grievance in respect thereof in accordance with law.

4. In view of the aforesaid directions, the present petition is disposed of. Notice is discharged with no order as to costs. "

The orders dated 16.9.2003 and 7.11.2003 passed by the Division Bench in Misc. Civil Application No.1615 of 2003 in Special Civil Application No.7703 of 2002 are reproduced as under :

"Order : Dtd.16.9.2003 :

It is too late to put up the defence that the amount calculated is wrong, therefore, 40 % of the amount payable as per direction of the Court be postponed. Before affidavit in defence is filed, let balance amount of 40 % of Rs.2,11,300/- be deposited in this Court within three weeks. Post the matter on October 7,

2003."

[Bhawani Singh] [J.N.Bhatt]
Chief Justice Judge

"Order Dtd. 7.11.2003

Pursuant to the direction dated 16.9.2003, respondents have deposited a sum of Rs.88,66,973/-towards 40 % of the balance amount covered by the direction dated 7.2.2003. 60 % of the total amount payable to the petitioners has been paid. Remaining amount, except Rs.75,57,212/-, be released in favour of the petitioners on verification by their counsel, meaning thereby, Rs.13,09,761/- be released to the petitioners as directed, and Rs.75,57,212/be invested in F.D.R. in the name of the Registrar, High Court of Gujarat, Ahmedabad, for a period of two months so that interest accrued is payable to the parties held entitled. The matter is postponed on the request of Mrs.Harsha Devani, learned Assistant Government Pleader, as she would like to verify whether petitioners have already been released the benefit of public holidays or not. Post the matter on December 2, 2003.

[Bhawani Singh] [J.N.Bhatt] "
Chief Justice Judge

16. In MCA No.2239/2003, the prayer is made to correct the figure and para 3(ii) of the order dated 7.2.2003. From the record, it is clear that no review application is filed by the State of Gujarat in SPECIAL CIVIL APPLICATION No. 3607 of 1982.In such circumstances, the question is whether, while considering the review application, the learned Single Judge is having any jurisdiction to examine the merits of the judgment dated 30.1.96 in SPECIAL CIVIL APPLICATION No. 3607/82. No doubt at one occasion, the learned Single Judge asked the learned advocate Mr. Shalin Mehta to avail alternative remedy or agree to adjudicate the issue before him. Mr. Mehta agreed for adjudication of the issue before the learned Single Judge. However, such concession or consent will not give any power or jurisdiction to the learned Single Judge to enter into the merits of the judgment dated 30.1.1996 in SPECIAL CIVIL APPLICATION No. 3607/82 which has attained

finality in view of the judgment of the apex court. However, on the basis of such consent given by the learned advocate Mr. Shalin Mehta for adjudication, the learned Single Judge examined the matter on merits on the basis of the GR dated 31.3.82 which too was not produced earlier for consideration of the court in SPECIAL CIVIL APPLICATION No. 3607/82 upto the apex court. The findings of the learned Single Judge are self contradictory. Learned Judge made reference of para 8 and 9 of the judgment dated 30.1.96 in SPECIAL CIVIL APPLICATION No. 3607/82 and interpreted the said paragraphs to the effect that the appellants are entitled for the benefit of public holidays as per the GR dated 31st March, 1982 without considering the fact that it was not the case of the respondents State of Gujarat right from the learned Single Judge upto the apex court.

17. We have perused the impugned order dated February 25, 2004 passed by the learned Single Judge in MCA No. 2239 of 2004. IN para 7 of the impugned order, the learned Single Judge has considered para 8 and 9 of the judgment dated 30th January, 1996 and has also considered conjoint reading of para 8 and 9 of the judgment dated 30th January, 1996. Thereafter, in para 8, 9, 10 and 11 of the impugned order, the learned Single Judge made the following observations :

" 8. The aforesaid takes me to examine the question as to whether such mistake was genuine or not. As observed earlier, the rights of the petitioners in SPECIAL CIVIL APPLICATION No. 3607/82 did not crystallized on the question of encashment of leave in lieu of work on public holidays. What was ordered by the Court was for giving benefits including the benefit of leave encashment in lieu of work on public holidays in accordance with the rules and Government Resolutions. If the Government Resolution dated 31.3.82 which is pressed in service is perused, the same does not provide for encashment of leave in lieu of work on public holidays and therefore while calculating the monetary benefits, the said amount could not have been included. Still, however, the same was included and, therefore, it appears that there was a genuine mistake on the part of the Government in including the monetary benefit of encashment of leave in lieu of work on public holidays and if such is the situation the modification of the order dated 7.2.2003 passed by this Court in SPECIAL CIVIL APPLICATION No. 7703/02 is called for. The reliance placed upon

the decision of the Apex Court in the matter of MK Shah Engineers & Contractors (supra) by Mr. Mehta for the original petitioner is of no help to the petitioners herein because in the case before the Supreme Court it was by contractual agreement the arbitration clause was accepted whereas in the present case the statement was made on the basis of which the order came to be passed. The said statement was based on the basis of figure and calculation which was submitted and it is the case of the State Government that the said figure came to be arrived at by mistake. Therefore, said decision of the Supreme Court would not apply to the facts of the present case.

9. In view of above, it was put to Mr. Mehta appearing for the original petitioners opponents herein as to whether the petitioners would like to resort to substantive proceedings for asserting their right to claim encashment of leave in lieu of work on public holidays by separate proceedings or the petitioners want adjudication in the present proceedings since application for modification in SPECIAL CIVIL APPLICATION No. 7703 of 1982 which was essentially for implementation of the order, dated 30.1.1996 in SPECIAL CIVIL APPLICATION No. 3607/82. In response to the same, Mr. Mehta under instructions from his clients declared before the Court that the petitioners would like to have adjudication in these proceedings and they are not desirous to resort to separate and independent proceedings.

10. Under the above circumstances, if the matter is further examined, it appears that the order dated 30.1.1996 passed in SPECIAL CIVIL APPLICATION No. 3607/82 if read in the light of language used by the court at paras 8 and 9 of the said decision shows that encashment of leave in lieu of work on public holidays was to be given in accordance with Government Resolution and further for giving equal treatment at par with other Govt. employees the petitioners had to make representation to the State Government for such purpose and if it is not properly considered the petitioners had to resort to remedies provided under law. It has not come on record nor it is the case of the petitioners that the State Government has granted leave encashment

benefit in lieu of work on public holidays to other employees. However, the contention which was sought to be canvassed by Mr. Mehta was that the Government resolution could not have been said to be within the knowledge of the employees concerned and he alternatively submitted that the said resolution would not apply. In furtherance to his submission, Mr. Mehta contended that in any case even if the resolution applies, the period is over and, therefore, only option left with the Govt is to give benefit of encashment of leave in lieu of work on public holidays. I find that ignorance of Govt. Resolution or failure of the Govt. for giving credit to the leave in lieu of work on public holidays can hardly be said as valid ground for asserting the benefit of encashment of leave in lieu of work on public holidays. It was for the petitioner concerned to request at the relevant point of time to the Govt to credit the leave in lieu of work on public holidays as per Govt Resolution dated 31.3.82. However, such request was not made by the petitioners at the relevant point of time as per Mr. Mehta since there was no knowledge about said resolution and Mr. Mehta since there was no knowledge about said resolution and Mr. Mehta in the alternative contended that even if such request had been made the same would not have been granted because of stay operating in the pending proceedings before the Apex Court.

11. The question of consideration of leave and giving credit would be a subsequent aspect but the fact remains that at the relevant point of time the petitioners have not requested for giving credit of such leave. I find substance in the contention of Mr. Mehta that in view of the stay order granted by the Apex Court so long as the petitioners are not treated at par with the Govt. employees said benefit could not have been conferred to the petitioners even for additional leave in lieu of work on public holidays. Further, there is also considerable force in the contention of Mr. Mehta that in view of dismissal of Special Leave Petition by the Apex Court and in view of confirmation of judgment of this Court in SPECIAL CIVIL APPLICATION No. 3607 of 1982 the petitioners would be in any case entitled to restitution of rights which otherwise which otherwise accrued to the petitioners and the same should be resorted on account of final

decision by the Apex Court. The principles of restitution are well known that any party who has enjoyed the benefit on account of pendency of proceedings has to make good such benefit if ultimately such party loses in the litigation. In the present case original petitioners have succeeded throughout upto the Apex Court and as a consequence thereof the petitioners would be entitled to assert those benefits which accrued to them as per the judgment of this Court in SPECIAL CIVIL APPLICATION No. 3607/82. Therefore, as a consequence of confirmation of decision of this court by the Apex Court all the benefits which otherwise had accrued to the petitioners are required to be restored and to that extent the contention of Mr. Mehta deserves to be accepted. Therefore, as a consequence thereof, it will have to be examined as to whether such benefits really accrued to the petitioners or not even as per the judgment of this court. If the claim is read as it is the benefit which accrued to the petitioners would be to the extent of credit of leave and its utilization thereof during the said period. On account of litigation from 1982 onwards until the decision was confirmed by the Apex Court and since the interim stay was granted by higher forum the judgment was not given effect. Had there been no interim stay granted by the Apex Court possibly petitioners would have claimed for crediting of leave and would have utilized the said leave during the said period. But merely because the time has expired of the concerned year it cannot be validly asserted by the petitioners that no said leave must be allowed to be encashed only and only there is no way out or there is no option but to pay leave encashment benefit. It will be for the State Government to consider the modalities for making good to the loss of leave suffered by the petitioners pending the proceedings before the Apex Court. The Government may in a given case take appropriate decision in accordance with law to give credit of leave to concerned employee with liberty to utilize the same during a particular period or in the alternative the Govt may also consider the matter for encashment of such leave if the circumstances so demand. The decision for such purpose at large is to be considered by the Government upon relevant considerations and such grant of leave, giving credit of leave in lieu of

work on public holidays and encashment thereof are essentially policy decisions of the Govt with which this court would not normally substitute its wisdom. Therefore, it will be for the petitioners to make appropriate representation to the Govt for giving credit of such leave and its utilization thereof and/or its encashment. If such representation is made by the petitioners, the Govt shall consider all the relevant aspects including the benefit of leave as accrued to the petitioners, whether the leave should be credited and its utilization within the stipulated time limit or its encashment can be permitted etc. shall be the questions which will be required to be decided by the State Govt if such representation is made.

11. Since in pursuance of the order passed by this court in SPECIAL CIVIL APPLICATION No. 7703/02 read with the order passed by the Division Bench of this Court in contempt proceedings the amount of leave encashment of Rs.75,57,212.00 is already deposited. I find that till the Govt shall finally decide the question of giving credit of such leave to the concerned employee for the purpose of utilization within a particular period and/or for its encashment the said amount should continue as deposit and the State Govt should be directed to decide such question within stipulated time limit."

18. From the aforesaid observations made by the learned Single Judge in the impugned order, it is clear that Learned Judge observed that the rights of the petitioners in SPECIAL CIVIL APPLICATION No. 3607/82 were not crystallized on the question of encashment of leave in lieu of work on public holidays. Learned Judge also examined that what was ordered by the Court in the judgment dated 30.1.96 was for giving benefits including the benefit of leave encashment in lieu of work on public holidays in accordance with the rules and Government Resolutions. In para 11 of the impugned order, Learned Judge observed and held to the extent that it will have to be examined as to whether such benefits really accrued to the petitioners or not even as per the judgment of this court. It was also held by Learned Judge in para 11 of the impugned order that merely because the time has expired of the concerned year it cannot be validly asserted by the petitioners that now said leave must be

allowed to be encashed and thereby Learned Judge examined the merits of the judgment dated 30.1.96 which was not open for Learned Judge since the said judgment was confirmed by the Apex Court. It was not open for Learned Judge to touch the merits of the said judgment dated 30.1.96 since that order was not under review before Learned Judge. While modifying his own order, it was not open for Learned Judge to consider the GR dated 31.3.82 since it was produced for the first time by the respondents in the said MCA No. 2239 of 2003 and was not produced in the earlier proceedings upto the apex court. From the aforesaid observations, it appears that the learned single judge has, while examining the MCA No. 2239/03, para 8 and 9 of the judgment dated 30.1.96, amounts to reexamination on merits. Therefore, observations made by the learned single judge are self contradictory.

19. Learned Single Judge has gone further to the extent that as a consequence thereof, it will have to be examined as to whether such benefits really accrued to the petitioner or not, even as per the judgment of this court and has left the matter open with direction to the petitioners to make representation to the State Government for conferment of utilization of encashment of leave in lieu of the work on public holidays which the petitioners could not utilize on account of pendency of the proceedings upto the apex court. Therefore, now it is necessary to examine whether the learned Single Judge was right in interfering with the judgment dated 30.1.96 while deciding MCA No. 2239/03 for modification of the order dated 25.2.04.

The apex court, in K. Rajamouli v. AVKN Swami [AIR 2001 SC 2316], has examined the question of maintainability of review petition after the judgment of the single judge has reached finality upto the apex court. In para 4 of the said judgment, the apex court observed as under:

"4. Following the decision in the case of Kunhayammed (2000 AIR SCW 2608 : AIR 2000 SC 2587) (supra) we are of the view that the dismissal of the special leave petition against the main judgment of the High Court would not constitute res judicata when a special leave petition is filed against the order passed in the Review Petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the high court. The

position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition. In such a situation of filing of review would be as abuse of the process of the law. We are in agreement with the view taken in Abbal Maligal Partnership Firm (1998 AIR SCW 4061 : AIR 1999 SC 1486) (supra) that if High Court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would be treated as affront to the order of the Supreme Court. But this is not the case here. In the present case, review petition was filed well within time and since the review petition was not being decided by the High Court, the appellant filed the special leave petition against the main judgment of the High Court. We, therefore, over rule the preliminary objection of the counsel for the respondent and hold that this appeal arising out of special leave petition is maintainable."

Thus, the apex court observed that the position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition and in such a situation of filing of review would be as abuse of the process of the law.

20. The question is how to restore the position in respect of the period from 1995 to 2000. The Special Leave Petition (Civil Appeal) against the main judgment was dismissed in 2000. Review petition was dismissed by the apex court in 2001 and thereafter, review application being MCA No. 2239 of 2003 is filed in December, 2003 by the State of Gujarat after long period. The apex court has, in the aforesaid decision, held that it amounts to abuse of the process of law.

21. Principles of review has been examined by the apex court in number of decisions, some of which are referred to as under, which will make clear the scope of review. In case of Lily Thomas versus Union of India [2000 AIR SCW page 1760], it has been observed as under by the apex court in para 52 and 55:

"52. The dictionary meaning of the word "review" is " the act of looking, offer something

again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumansinhji Arjunsinghji, AIR 1970 SC 1273 held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the errors pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its prepetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in S. Nagraj v. State of Karnataka, 1993 Supp. (4) SCC 595 held;

'Review literally and even judicially means re-examination or reconsideration Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the Courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithvi Chand Lal Choudhury v. Sukhraj Rai and others, AIR 1941 Federal Court 1, the Court observed that even though no rules had been framed permitting the highest court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh 1 Moo PC 117 that an order made by the Court was final and could not be altered.

".....nevertheless, if by

misprision in embodying the judgments, by errors have been introduced, these Courts possesses, by Common Law, the same power which the Courts of record and statute have of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. "

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed and substantive power to rectify on recall the order passed by this Court was specifically by Article 137 of the Constitution . Our Constitution Makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order 40 had been framed empowering this Court to review an order in civil proceedings on grounds analogues to Order 47 Rule 1 of the Civil Procedure Coude. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misrepresentation of true state of circumstances has been held to be sufficient

ground to exercise the power. Apart from Order 40 Rule 1 of the Supreme Court Rules, this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The Court is, thus, not precluded from recalling its own order if it is satisfied that it is necessary to do so for the sake of justice."

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength. "

Para 55 of the said judgment is reproduced as under:

" It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise.The mere possibility of two views on the subject is not a ground. Once a review petition is dismissed, no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of co-ordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Art. 136 or Art. 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute can take a different view notwithstanding the earlier judgment."

In Rajendrakumar and others versus Rambhai & others [2003 (1) GLH 571, the apex court has considered limited power of review. In para 4 of the said judgment, it has been observed as under:

"On perusal of the order under challenge, it is clear that the High Court without considering the question whether the judgment / order sought to be reviewed suffered from any error, entered upon the exercise of reappreciating the evidence and no such reappreciation of evidence redetermined the compensation by reducing the amount to the

extent noted earlier. The limitation on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment / order cannot be disturbed."

In case of M/s. Green View Tea and Industries v. Collector, Golaghat, Assam and another, [2004 AIR SCW 1347, it has been observed by the apex court as under in para 15:

"15. Before we look at the facts of the case, we wish to emphasize the approach to be adopted by the Court while administering justice. This Court in S. Nagraj and others v. State of Karnataka and others, 1993 Supp (4) SCC 595, at pg. 630 (para 36) observed;

'It is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences. An act of Court should prejudice none. "Of all these things respecting which learned men dispute," said Cicero, for justice and that right is founded not in opinion but in nature." This very idea was echoed by James Madison (The Federalist, No.51 at p. 352). He said:

"Justice is the end of the Government. It is the end of the civil society. It ever has been and ever will be pursued, until it be obtained or until liberty be lost in the pursuit."

In Kalyani Packaging Ind. versus Union of India and others [2004 (6) SCC 719], the apex court observed as under in para 3:

"Reliance is placed on circular of 1973 and 1987. These circular were not relied upon before the lower authorities. They are being relied upon for the first time in this Court. Parties cannot be permitted to rely upon the material which have not been relied upon before the lower authorities/courts. In this case before the

lower authorities, reliance was placed only upon the circular of 1995. That circular, being of 1995, can be of no assistance to the petitioners as the period concerned is August 1990 to January, 1991."

21. Considering the ratio of the aforesaid decisions in light of the fact that the State of Gujarat has, for the first time, produced the GR dated 31.3.1982 in MCA No. 2239/03 pointing out that the encashment of public holidays is not available to the appellants because of the said Resolution, we are of the view that the learned Single Judge was not justified in considering the said Resolution dated 31.3.82 since it was produced before Learned Judge for the first time and it was not produced at any stage in the earlier proceedings. Since the said material was not produced earlier by the State of Gujarat and since it was produced for the first time by the State of Gujarat before the learned Single Judge, on the basis of such material, the learned Single Judge was not justified in interfering with and disturbing the order dated 30.1.1996 which has attained finality. In Union of India v. Paul Manickam and another, [AIR 2003 SC 4622], it has been observed by the apex court in para 17 :

"17. As noted supra, for the first time in the review application, it was disclosed that the representation was made to the President of India and no representation was made to the State of Tamil Nadu or the Union of India who were arrayed in the writ petition as parties. This appears to be a deliberate attempt to create confusion and dubious device. The High Court also transgressed its jurisdiction in entertaining the review petition with an entirely a new substratum of issues. Considering the limited scope for review the High Court ought not to have taken into account factual aspects which were not disclosed or were concealed in the writ petition. While dealing with a habeas corpus application undue importance is not to be attached to technicalities, but at the same time where the Court is satisfied that an attempt has been made to deflect the course of justice by letting loose red herrings the Court has to taken serious note of unclean approach. Whenever a representation is made to the President and the Governor instead of the indicated authorities. It is but natural that the representation should indicate as to why the representation was made to the President or the Governor and not the indicated authorities.

> It should also be clearly indicated as to whom the representation has been made specifically, and not in the manner done in the case at hand. The President as well as the Governor, no doubt, are constitutional Heads of the respective Governments but day to day administration at respective levels are carried on by the Heads of the Department Ministries concerned and designated officers who alone are ultimately responsible and accountable for the action taken or to be taken in a given case. It really the citizen concerned genuinely and honestly felt or interested in getting an expeditious consideration or disposal of his grievance, he would and should honestly approach the really concerned authorities and would not adopt any dubious devices with the sole aim of deliberately creating a situation for delay in consideration and cry for relief of his own manipulated ground, by directing his representation to an authority which is not directly immediately concerned with such consideration."

22. The apex court has considered that a new material was produced for the first time on record in a review application which amounts to and appears to be a deliberate attempt of the party to create confusion and reap an undeserved benefit by adopting such dubious device. It was also observed by the apex court that the High Court also transgressed its jurisdiction in entertaining the review petition with an entirely a new substratum of issues. It was also observed that considering the limited scope for review the High Court ought not to have taken into account factual aspects which were not disclosed or were concealed in the writ petition. Similarly, in the facts of this case also, the GR dated 31.3.82 is a new document, produced for the first time in the proceedings of MCA NO. 2239/03 wherein prayer for modification/review of the order in SPECIAL CIVIL APPLICATION No. 7703/02 was made and it was not produced in the proceedings of SPECIAL CIVIL APPLICATION No. 3607/82 right upto the apex court and the said GR dated 31.3.82 was produced in the review application with deliberate intention and/or an attempt on the part of the State of Gujarat to create confusion and for undeserved benefit with an intention not to pay cash amount to the appellants daily wager for which they are entitled after the decision in SPECIAL CIVIL APPLICATION No. 3607/82 was confirmed by the apex court.

23. Looking to the facts on record and considering

the various orders passed by the learned Single Judge as well as Division Bench of this Court, in reality, the order dated 30th January, 1996 has been fully implemented by the respondents. The respondents have prepared the statement in respect of each appellants to the effect that how much amount they are entitled. In the said statement, amount of encashment of public holidays is also mentioned, meaning thereby, respondents have accepted the judgment dated 30th January, 1996 and implemented the same by obtaining necessary sanctions from the competent authority. Once the judgment dated 30th January, 1996 is already acted upon, and subsequent to that, review petition is filed after period of two years, in that case, review petition is not maintainable. That view has been taken by the Apex Court in case of STATE OF NAGALAND AND ANOTHER V. TOLLAVI KIBAMI AND ANOTHER, 2003 [8] SCC 671, wherein the observations in para-2 reads as under;

> "Having heard learned counsel for the parties, we are of the view that in view of the subsequent events that had taken place consequent upon the judgment of the Division Bench, the review petition filed by the respondent No.1, was not maintainable. In fact, the judgment of the Letters Patent Bench was acted upon and it stood exhausted and the review petition was futile. Under such circumstances, the review petition ought not to have been entertained and decided on merits."

> "In garb of clarification or modification or recall, circumvention of circulation procedure for review by means of, is impermissible and amounts to abuse of process and deserves to be dismissed with exemplary cost, as per the view taken by the Apex Court in case of Zahira Habibullah Sheikh v. State of Gujarat, 2004 [5] SCC 353. The Apex Court has also observed that "what cannot be directly, cannot be permitted to be done indirectly."

24. In view of the above referred decision of the apex court, where the scope of review has been examined by the apex court in various decisions, looking to the facts of the present case, according to our opinion, in the peculiar facts and circumstances of this case, the learned Single Judge has committed gross error in interfering with the final directions issued in the judgment dated 30.1.1996 in SPECIAL CIVIL APPLICATION No. 3607/82 which was confirmed by the apex court. According

to our opinion, the decision of the learned Single Judge dated 25.2.2004 is without jurisdiction; Learned Judge has transgressed the jurisdiction in examining the merits of the judgment dated 30.1.1996. Learned Judge should not have disturbed the judgment of this court dated 30.1.96 while considering or examining the review application being MCA NO. 2239/03. It ought to have been appreciated by the learned Single Judge that the review application based on the GR dated 31.3.82 cannot be entertained since the said GR was not produced by the State of Gujarat at any point of time in the earlier proceedings upto the apex court. It ought to have been appreciated by the learned Single Judge that it was not a review petition in SPECIAL CIVIL APPLICATION No. 3607/82 but was review of the order in SPECIAL CIVIL APPLICATION No. 7703 of 2002. Learned Judge should have confined himself to order dated 7.2.2003 and should not have travelled beyond that. In reality, Learned Judge has reconsidered and re-examined the judgment in his own way and has come to the conclusion that the right of the appellants are not crystallized in the judgment dated 30.1.1996 and for that, the appellants should be relegated to the remedy of representation to the State Government. The findings given by the learned Single Judge in the impugned order are self contradictory. Learned Judge has erred in passing the order on the basis of the new material namely GR dated 31.3.82 which was not produced by the State of Gujarat in the earlier proceedings arising from SPECIAL CIVIL APPLICATION No. 3607/82 upto the apex court. In execution proceedings, it is a settled principle of law that the Court executing a decree cannot go behind the decree. In Special Civil Application No. 7703/02, the appellants were seeking execution of the judgment dated 30.1.1996 wherein the learned Single Judge passed order on the basis of the admission of the State of Gujarat as reflected in order dated 29.1.2003 and 7.2.2003 and, therefore, Learned Judge ought to have simply directed the State of Gujarat to comply with the judgment and order of this Court dated 30.1.1996 instead of entering into all these aspects as to which rights were crystallized and which were not by this court while delivering the judgment dated 30.1.1996 and in doing so, Learned Judge has travelled beyond the scope of the jurisdiction. Therefore, according to our opinion, the impugned order dated 25.2.2004 made by the learned Single Judge is without jurisdiction, it amounts to non application of mind and therefore requires to be quashed and set aside. According to our opinion, the appellants are entitled for the encashment of public holidays, individual figure of which come to Rs.13000 to Rs. 15000 per head and it was rightly calculated by the

State of Gujarat in the statement and all the appellants are entitled for such benefits of encashment of public holidays which is, according to our opinion, real restitution in its real sense. It is also in public interest.

25. Now, we are examining the submissions made by the learned advocates for the parties in light of the undisputed facts emerging from the record.

In light of the aforesaid facts, we are examining the issue whether any mistake has been committed by the State of Gujarat in calculating the amount or not OR what is the real mode of implementing the directions issued by this court vide its judgment dated 30.1.1996. Instead of immediately implementing the judgment dated 30.1.1996, the State of Gujarat preferred to challenge the same and it challenged the said judgment initially before the Division Bench of this Court by filing Letters Patent Appeal and then before the apex court by filing Special Leave Petition (Civil) and also obtained interim stay against the operation of the judgment dated 30.1.96. In view of that, now, it is the duty of the State of Gujarat to pay full wages to the appellants concerned of the public holidays during the five years period in cash and as per our opinion, that is the real mode of execution of the judgment dated 30.1.96 and that is the real restitution of legal rights of the appellants.

26. The apex court has examined the principles of restitution in case of South Eastern Coalfields Ltd. v. State of M.P. and others reported in 2003 AIR SCW 5258. In the said reported decision, the apex court has considered a reverse case where by obtaining an interim order, some restrictions were imposed against the defendant and ultimately, the petition was dismissed and the loss caused to the defendant because of the operation of the interim orders against him and, therefore, the defendant has been compensated by the apex court by directing to pay the said amount with interest examining the principles of restitution under section 144 of the Code of Civil Procedure which has been statutorily recognised and also considering a pre existing rule of justice, equity and fair play for restitution of the original situation by making or by ordering necessary payment of interest to an aggrieved party. This aspect has been examined by the apex court in a reverse case. Relevant observations made by the apex court in para 24, 25 and 26 of the said decisions (page 5270 to 5272) are reproduced as under:

24. In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (See Zafar Khan & Ors. v. Board of Revenue, UP & Ors AIR 1985 SC 39). In law, the term 'restitution' is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, P. 1315), the Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for inquiry done. "Often, the result in either meaning of the term would be the same..... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non tortious misrepresentation, the measure of recovery is not rigid but as in other cases of restitution, such factors as relative fault, the agreed upon risks and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed". The principle of restitution has been statutorily recognized in Is. 144 of the Code of Civil Procedure, 1908. Section 144 of the CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the

interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party who has gained by the interim order of the Court so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the Court at the stage of final decision, the Court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

25. Section 144 of the CPC is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from S.144, the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwadi (1922) 49 IA 351, their Lordships of the Privy Council said : "It is the duty of the Court under Is. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved. Cains, LC said in Rodger v. Comptoir d' Escompte de Paris, (1871) LR 3 PC : "One of the first and highest duties of all the Courts is to take care that the act of the Courts does not injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the Case "This is

also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, AA Nadar v. SP Rathinasami (1971) 1 MLJ 220. IN the exercise of such inherent power the Courts have applied the principles of restitution to myraid situations not strictly falling within the terms of Is. 144.

26. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court, the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate the court would act in conjunction with what is the real and substantial justice. The inquiry, if any, caused by the act of the Court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts,

persuading the court to pass interlocutory orders favorably to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then, the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation."

In Karnataka Rare Earth and Anr. V. Senior Geologist Department of Mines & Geology and another; [2004 (2) SCC 783, recently the apex court has considered the principles of restitution. Para 9 and 10 thereof are reproduced as under:

"9. It is true that by the interim orders passed by this Court the appellants were allowed during the pendency of the earlier appeals to operate under the mining leases, whether freshly granted or renewed and to effectuate the interim orders the authorities were also directed to issue transport permits. Admittedly, the transport permits were obtained by the appellants after the dismissal of their appeals. The appellants claim that both the parties were ignorant of the dismissal of appeals when the transport permits were issued and the granite blocks were exported. It is difficult to accept the plea of the appellants that the dismissal of the appeals was not in their knowledge inasmuch as the judgments must have been pronounced in an open court and their counsel at Delhi must have gathered the knowledge thereof. In any case, the appellants cannot be heard taking shelter behind their own convenient ignorance. In our opinion, whether they had the knowledge of the judgment or not and whether the transport permits were obtained by the appellants before the dismissal of the appeals during which the interim orders were in operation or after the dismissal of the appeals when the interim orders had ceased to operate would not make any difference. For the purpose of the law it is enough that the

appellants have enjoyed the benefit under the interim orders of the court which have stood vacated with the dismissal of their appeals. It is also noteworthy that this Court had not, in the earlier appeals, directed the judgment of the High Court to remain stayed in its entirety and this is an additional factor which tells adversely on the appellants.

10. In South Eastern Coalfields Ltd. [4(2003) 8 SCC 648], this Court dealt with the effect on the rights of the parties who have acted bona fide, protected by interim orders of the court and incurred rights and obligations while the interim orders stood vacated or reversed at the end. The Court referred to the doctrine of actus curaie neminem gravabit and held that the doctrine was not confined in its application only to such acts of the Court which were erroneous; the doctrine is applicable to all such acts as to which it can be held that the court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the court to pass an order which at the en is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an improvement which it would not have suffered but for the order of the court and the act of such party, then, the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation. is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost."

The apex court has observed that once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution and that such interest is not controlled by the provisions of the Interest Act of 1839 of 1978. In the instant case, according to our opinion, the doctrine of restitution is attracted and, therefore, as per the principle of restitution, the appellants are entitled for encashment of the public holidays. In view of the above, the

appellants daily wagers are entitled for the encashment of public holidays. Suggestion of the State of Gujarat as per the affidavit dated 7.7.2004 read with the GR dated 31.3.82 is not, in public interest as well as in real sense, no restitution because it would be a compulsion on an employee to proceed on leave if they want to enjoy the public holiday with wages during the working days. This is apparently a force on the employee to enjoy the special leave and that is why it cannot be considered to be the restitution in its real sense. Therefore, according to our considered opinion, there was no any mistake or error on the part of the concerned officers of the State of Gujarat in calculating the encashment of public holidays in favour of the appellants daily wagers and this is the real restitution to respect the verdict of the Court. In view of that, the submissions made by the learned Advocate General are not accepted by us and the same are rejected. Decisions cited by Mr. Shelat are not applicable to the facts of the present case. The case of S. Nagraj and others versus State of Karnataka, JT 1993 (4) SC page 27 is on a different footing. Here, since the calculations made by the State of Gujarat for encashment of leave were correct and not because of any error, same is not applicable to the facts of the present case.

27. We are of the view that the learned Single Judge has committed grave error in relying upon the GR dated 31.3.1982 since it was produced by the State Government for the first time in MCA No. 2239 of 2003 and not produced in the earlier proceedings upto the apex court. We are of the opinion that an application seeking modification and/or review of the earlier order cannot be entertained on the basis of a new material and it is having very limited scope of correction of typographical error/mistake which is apparent on the face of the record. From the bare perusal of the impugned order of the learned Single Judge, it appears that the entire order has been passed by Learned Judge as if Learned Judge was examining the merits of both the orders dated 30.1.1996 as well as 7.2.2003 as a Court of Appeal. While entertaining the application seeking review of the order dated 7.2.2003, it was not open for him to examine as to which rights of the appellants were crystallized and which were not crystallized and in examining such aspect of the order dated 30.1.96 while entertaining review application being MCA No. 2239 of 2003, he has committed grave error. After the order has become final and has attained finality upto the apex court, filing of an application for review/modification amounts to misuse of the process of the court. Because of the operation of

the interim stay granted by the apex court for a number of years, natural effect would be that the appellants were required to work on public holidays and no wages for those public holidays were paid to the appellants. Since the stay was obtained by the State and since the benefits of such stay order were enjoyed by the State Government, after finalization of the proceedings and after vacation of the stay order by the Apex Court, it was incumbent upon the State Government to restore the position following the principles of restitution.

28. According to our opinion, since the State Government is not disputing the entitlement of the appellants for public holidays and the suggestions made in the affidavit dated 7th July, 2004 that the State Government is prepared to give such leave to the appellants in lieu of public holidays. The State Government is also prepared to pay in cash benefits of public holidays to the person/s who retired and expired. There is suggestion to extend time limit upto 3 years or till the date of retirement whichever is earlier, for availing special leave with wages on working days to such persons. Suggestion of the respondents is not workable and practicable and not in the public interest because direction to en employee to avail leave even if he is not required to avail it would amount to force an employee to proceed on leave and that itself is against the public interest and service jurisprudence. It is for the employee to decide whether he should proceed on leave or not but he cannot be forced to proceed on leave only with a view to avoid encashment thereof. Therefore, real mode of restitution is to make payment or encashment of public holidays to the workmen. Looking to the number of workmen, hardly it would come to Rs.13000 to Rs.15000 per head. Therefore, according to our opinion, learned Single Judge has committed gross error in passing the order dated 25.2.2004 and the same is without jurisdiction since Learned Judge has disturbed the Original Order dated 30.1.96 which was confirmed by the Apex Court and has attained finality between the parties. Amount is already lying in the Registry of this Court and, therefore, now, it is not the headache for the Government to make provision of the said amount. Therefore, according to our opinion, the appellants are entitled for the real restitution of their legal right by way of encashment of public holidays and the suggestion made by the respondents in their affidavit in reply is not proper and effective restitution and in public interest, therefore, according to our opinion, order in question is required to be quashed and set aside.

29. Accordingly, this appeal is allowed. The order dated 25.2.2004 made by the learned Single Judge in MCA NO. 2239 of 2003 is hereby quashed and set aside. Order dated 7.2.2003 in Special Civil Application No.7703 of 2002 is hereby restored. It is held that the appellants are entitled for encashment of public holidays and the calculation made by the respondent in the statement produced by the respondent on record is the right calculation. Registry is directed to make payments of Rs. 75,57,212.00 to the appellants-original petitioners namely individual workmen held entitled to the claim by this judgment, by Account Payee Cheque after proper verification.

Civil Application No.2674 of 2004 is also disposed of accordingly.

No order as to costs.

[BHAWANI SINGH]
CHIEF JUSTICE

Date :14/10/2004 [H.K.RATHOD]
JUDGE
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